DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-181519 DATE: February 24, 1975

MATTER OF: Atlantic Maintenance Company

DIGEST:

1. Bid which stated monthly price for estimated square footage to be serviced instead of unit price based upon square footage is correctable as clerical error apparent on face of bid since correct unit price is determinable from bid by division of monthly price by estimated square feet stated in bid and no other intended unit price is logical or reasonable.

2. Submission with bid of required bid guarantee issued in excess of Treasury Department underwriting limitation (and not reinsured) does not render bid nonresponsive as bid bond in excess of such limit is not void per se and amount of authorized bond limit is sufficient to cover difference between low acceptable bid and second low acceptable bid, and Government is accordingly protected by valid surety obligation. Failure of bond to reflect surety's liability limit waived as minor informality because power of attorney of attorney-in-fact signing bid for surety expressly stated surety's liability limit by attorney.

3. Allegation that bidder whose bid included properly executed certification by corporate secretary under corporate seal that signer of bid was authorized to do so, must submit additional evidence indicating Board of Directors authorized execution of bid is rejected, as contracting officer, who has primary responsibility to determine sufficiency of evidence of signer's authority, indicates certification execution was adequate and in conformance with bid and protester has not submitted evidence why this conclusion is unreasonable.

4. GAO will not review affirmative responsibility determination even though it is alleged that fraud and/or conflict of interest charges involving prospective contractor can be resolved by objective standards, since factual basis for such charges and the effect on integrity as that factor relates to responsibility involves the subjective judgment of contracting officer which is not readily susceptible to reasoned review. While foregoing rule as to GAO scope of review would not preclude taking exception to award where legal effect of contracting officer's findings showed violation of law such as to taint procurement, no such violation of law is shown by contracting officer's findings in this case.

PUBLISHED DECISION
54 Comp. Gen. ....

Atlantic Maintenance Company (Atlantic) has filed a protest with this Office against an award to any other bidder under invitation for bids (IFB) No. DAAA25-74-B-0477, issued on May 10, 1974, by the United States Army, Frankford Arsenal, Philadelphia, Pennsylvania. The Army has in the interim periodically extended the contract of the incumbent, Atlantic.

The invitation, a total small business set-aside, was issued to procure the services, materials, supplies, and equipment necessary to accomplish all custodial services for the Arsenal for fiscal year 1975. Each bidder was instructed, inter alia, to indicate in its bid its unit price per square foot per month for the estimated quantity of 1,123,000 square feet per month, and also its total contract price determined by multiplying the number of square feet per month by the number of months (12) duration, multiplied by the rate per square foot. Bidders were also required to submit a certificate of authority to bind their respective corporations, and an acceptable Bid Guarantee in the amount of twenty percent of the bid price or $3,000,000, whichever was less.

On June 10, 1974, opening date, four bids were received as follows:

Bidder	Unit	Unit Price	Total Amount
1. Kentucky Building Maintenance, Inc.	Job	$.0324	$436,622.40
2. Suburban Industrial Maintenance, Inc.	Job	41,400	496,800.00
3. Atlantic Maintenance Co.	Job	.041	552,516.00
4. Clarkie's, Inc.	Job	.055 per sq. ft.	741,480.00

On June 17, 1974, Atlantic filed this protest against award to either Kentucky or Suburban on the grounds that the bids of both Kentucky and Suburban were nonresponsive, both Kentucky and Suburban were non-responsible prospective contractors, and the bids of both Kentucky and Suburban were invalid bids because they did not bind the corporations

and thus neither bid could "ripen" into a proper award. For reasons discussed below, the protest against an award to Suburban is denied.

With regard to Kentucky, during the pendency of this protest we were advised by the Army by letter of November 6, 1974, that it had permitted Kentucky to withdraw its bid on the basis of clear and convincing evidence of a mistake in bid. Therefore, on the basis that Kentucky was no longer in line for award under this IFB, Atlantic withdrew its protest against Kentucky by letter of November 29, 1974. Accordingly, this aspect of Atlantic's protest, as well as the Army's request for an advisory opinion on Atlantic's arguments concerning alleged ultra vires acts of Kentucky, is academic and will not be considered further.

With respect to its protest against Suburban, Atlantic argues that Suburban's bid is nonresponsive because it did not provide a unit price per square foot per month as required but rather a total monthly price, and that if this is an alleged error, it cannot be remedied under the applicable regulation as an apparent clerical error because it is susceptible to at least two different reasonable interpretations as to the manner of mistake and intended unit price. It is also contended that the bid is nonresponsive because the Government would not be able to add or reduce the square feet to be serviced under a unit bid price of $41,400 monthly, rather than a square foot unit price, and therefore the Government's option to change the work volume under the contract has been eliminated by Suburban's method of bidding. In addition, it is argued that Suburban's bid should be considered nonresponsive in this regard because it purposefully used this manner of bidding so it could claim a mistake and withdraw its bid if it so desired.

Atlantic further contends that Suburban's bid is nonresponsive because, although Suburban furnished a bid bond with a penal sum of $99,500 (which satisfied the 20 percent requirement), the corporate surety furnishing the bond had an underwriting limit set forth in Department of the Treasury Circular 570 of $92,000, which Standard Form 24 (Bid Bond) cautioned it could not exceed. Accordingly, it is alleged that the bond as issued is void as a matter of law because it is in excess of the surety's limit and a proper bond was not submitted with the bid as required, and thus the bid is nonresponsive. Also, Atlantic submits that Suburban's bond is void because it does not reflect on its face the surety's liability limit. Finally, it is argued that the bond may not be considered adequate under the rationale of B-176107, November 16, 1972, as unlike the situation in that case, there is no evidence that the surety here had obtained any reinsurance.

Atlantic also contends that Suburban's bid was nonresponsive even though it contained an executed "Certificate of Authority to Bind Corporation," as it did not include any documentary evidence that Suburban's Board of Directors authorized the Suburban agent, Mr. James Butler, to execute the bid for the corporation. In Atlantic's view, such evidence is contemplated by, and implicit in, section B-16 of the solicitation, which required the aforementioned Certificate, and therefore it is argued that Suburban's bid is ineligible for award unless and until Suburban furnishes a copy of the certified minutes of the Suburban Board of Directors dated on or before June 10, 1974, that the Suburban Board by resolution authorized Mr. Butler to execute binding bids on behalf of the corporation.

In response to the first issue presented by Atlantic's protest, the Army considers Suburban's failure to bid a unit price per square foot per month an apparent clerical error on the face of the bid which is correctable by the contracting officer pursuant to Armed Services Procurement Regulation § 2-406.2 (1974 ed.). Since it was necessary to resort only to the bid documents to arrive at Suburban's intended unit price, the Army considers the Suburban bid to be correctable so as to reflect Suburban's intended unit price and, therefore, it considers as incorrect Atlantic's argument that Suburban's bid is nonresponsive because its price of $41,400 would prevent the Army from modifying the estimated square feet to be serviced. The Army points out that correction of Suburban's bid would yield a precise unit figure which would be available for additions, deletions, and determinations of square footage actually cleaned, and this would eliminate the problems envisioned by Atlantic.

With respect to Suburban's bid bond, the Army recognizes that Suburban's surety, International Fidelity Insurance Company, exceeded its underwriting limitation, and has not investigated whether the surety secured reinsurance. Nevertheless, the Army argues that Suburban's bond is acceptable pursuant to ASPR § 10-102.5(ii) (1974 ed.), which permits acceptance of bid bonds which are less in amount than required by the IFB but which are equal to or greater than the difference between the low bid price and the next higher acceptable bid. Since the price difference between the bids of Suburban and Atlantic is $55,716, the Army considers the bond of Suburban to be valid for at least that amount, and believes the cited regulation should apply.

Concerning the contention that Suburban must also submit additional documentation from Suburban's Board of Directors with respect to its agent authority to sign the bid, the contracting officer considers the certification by Suburban's corporate secretary, under corporate seal, that Mr. Butler was the corporate treasurer when he signed the bid adequate and, therefore, that the bid was properly signed for and on behalf of the corporation, and binding upon the corporation upon acceptance.

In our opinion, the contracting officer did act reasonably in determining that Suburban's bid was responsive and that it made a clerical error which is correctable. Pursuant to ASPR § 2-406.2 (1974 ed.), a "clerical mistake apparent on the face of a bid may be corrected by the contracting officer prior to award, if the contracting officer has first obtained from the bidder written or telegraphic verification of the bid actually intended." The mistake which is apparent is that Suburban failed to insert its unit price per square foot per month, but rather inserted its unit price per square foot per month multiplied by 1,123,000 square feet, the monthly estimate. This is ascertainable from the face of the bid because the bidding formula in question was unit price per square foot per month, times monthly estimate, times 12 months. An examination of the monthly and aggregate figures in Suburban's bid indicates that its monthly bid price is equal to its aggregate price over a 12 month period, the contract term. It is a simple matter to recompute Suburban's unit price per square foot per month, which is $.03686, and correction is consistent with Suburban's total monthly price and its aggregate price, as no other unit figure could be computed from the IFB's bidding formula. See Matter of Berc Building Maintenance Company, B-181489, September 6, 1974; B-164453, July 16, 1968. We do not believe it logical that Suburban bid $41,400 as other than its total monthly price, as the bid formula was clearly explained on the same page and as Suburban thereafter followed that formula to arrive at its total bid prices. Therefore we cannot agree with this aspect of Atlantic's argument. 46 Comp. Gen. 77 (1966). Also, we cannot agree that Suburban intended to bid a unit price of $.0414, as the extension of that unit price is considerably more than the $498,000 aggregate bid of Suburban (which figure is consistent with the bidding formula).

Atlantic also argues that Suburban's unit price method of bidding makes its bid nonresponsive because Suburban's unit bid price of $41,400 prevents the Government from revising the work to be done by Suburban on the basis of the IFB revision formulas based on square footage. Atlantic's argument is based on the premise that the Army could not correct Suburban's price of $41,400 to its unit price per square foot per month. However, as we do not object to the correction of Suburban's bid price as proposed by the contracting officer, it is clear that the Army can revise Suburban's unit price in conformity with the IFB provisions. Therefore, Atlantic's argument is without merit and Suburban's bid may be corrected upon verfication by Suburban as contemplated by ASPR § 2-406.2 (1974 ed.).

With regard to Atlantic's next argument, the IFB provided that failure of a bidder to furnish a bid guarantee with good and sufficient sureties acceptable to the Government in the amount of 20 percent of the bid price may be cause for rejection of the bid. ASPR § 2-404.2(h) (1974 ed.) provides that a bidder's failure to furnish the bid guarantee as required by the IFB shall cause the bid

to be rejected except as otherwise provided in ASPR § 10.102.5 (1974 ed.). It is urged by the Army that Suburban's submission of a bond in excess of the corporate surety's underwriting limitation can be waived pursuant to ASPR § 10-102.5(ii) (1974 ed.), as the amount of Suburban's bond as covered by the surety's underwriting limitation is equal to or greater than the difference between the price stated in its bid and the price stated in the next higher acceptable bid. We considered a similar problem in B-176107, November 16, 1972, also involving International, where International submitted a bond of $100,000 even though its underwriting limitation was $69,000, and it obtained reinsurance for the excess amount pursuant to the provisions of Treasury Circular 297, 31 C.F.R. § 223.10-11 (1974). On these facts, we applied ASPR § 10-102.5(ii) and considered the bid guarantee to be valid in the amount of $69,000. Atlantic argues that the cited case does not control in this instance as reinsurance has not been obtained. In our opinion, the principle questions are the validity of the bond and whether the Government can secure protection under ASPR § 10-102.5(ii) (1974 ed.). As indicated in B-176107, supra, it is our opinion that a bond issued in excess of the surety's underwriting limit is not per se invalid. We are advised by the Department of the Treasury, Fiscal Service, Bureau of Accounts, that the bond, if otherwise valid, is not rendered invalid by reason of its exceeding the limitation set forth in Treasury Circular 570. Rather, such overstatement is a matter between the surety and the Treasury Department, and may subject the surety to a loss of its Certificate of Authority. 31 C.F.R. § 223.17 (1974). Moreover the exception listed in ASPR § 10-102.5(ii) (1974 ed.) permits the acceptance of an otherwise unacceptable bond if the amount of the guarantee covers the price difference between the low and next low acceptable bids. As this difference is $55,716 in this case, and as the bond is valid up to at least $92,000, we consider the bond acceptable. B-176107, supra, does not require rejection of this bond, because reinsurance was obtained in that instance to make the bond comply with the Treasury Department requirements, not to insure the legal obligation of the surety under the bond.

Although the bond fails to properly set forth the liability limit, this does not in our opinion require rejection of the bond. The bond was signed by Frances D. O'Donnell, as Attorney-in-Fact for International, and the Power of Attorney of International stipulates that Mr. O'Donnell is authorized to sign such bid bonds in the sum not to exceed $100,000. In these circumstances, the failure to insert the limit on the face of the bond can be waived as a minor informality. See, e.g., 53 Comp. Gen. 431, 434 (1973); 51 Comp. Gen. 802 (1972).

Regarding whether Suburban satisfactorily established the authority of Mr. Butler to bind Suburban, the IFB provided in paragraph 2(b) of Standard Form 33A that all offers signed by an agent were to be accompanied by evidence

of the agent's authority unless previously supplied. To this end, paragraph B-16 of the IFB required each corporate offeror to execute the following "Certificate of Authority to Bind Corporation:"

> "Contractor, if a corporation, should cause the following certificate to be executed under its corporate seal, provided that the same officer shall not execute both the contract and the certificate:
>
> I, _____, certify that I am the Secretary of the Corporation named as Contractor herein; that _____ who signed this bid/proposal on behalf of the Contractor, was then _____ of said corporation; that said bid/proposal was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.
>
> AFFIX CORPORATE SEAL: _____"
> (Secretary's Signature)

Suburban properly executed this Certificate. ASPR § 20-102(c) (1974 ed.) provides that the evidence required to establish the authority of a particular person to bind a corporation is for the determination of the contracting officer. In this connection, the corporate Secretary, under corporate seal, attested to the corporate authorization underlying Mr. Butler's signature, and the contracting officer believes this is sufficient evidence of actual authority to sign, and is in fact normally acceptable in commercial transactions. Since the solicitation required no more than execution of the Certificate and the contracting officer is satisfied as to Mr. Butler's authority, we see no basis to take exception or require additional proof of authorization.

Atlantic also argues that Suburban's submission of a bid based upon a monthly price of $41,400, rather than the contemplated unit price, so that Suburban could claim a mistake and withdraw its bid if it so desired, puts in issue Suburban's responsibility because this action raises questions about its business integrity. Additionally, Atlantic contends that Suburban is not a responsible prospective contractor as its ability to meet the requirements on this procurement are very questionable because it had never performed a contract of this magnitude or complexity, and does not have the necessary financing, equipment or personnel. Also, Atlantic submits that Suburban is nonresponsible because it submitted a bid bond of a corporate surety which exceeded its underwriting limitation and of which fact Suburban was on constructive notice because the limitation was published in the Federal Register. Moreover, Atlantic argues that since the surety in question has in the past

issued bonds in excess of its authority, the surety's alleged lack of integrity in perpetuating this practice should be imputed to its principal, Suburban.

The final points raised by Atlantic relate to the actions of both Suburban and an employee of the Arsenal who performs part-time work for Suburban. The employee in question, Mr. Roosevelt Woodson, is a full-time custodial work inspector for the Arsenal, and has for the past several years also worked part-time for Suburban. Atlantic contends that the mere fact of dual employment, under the instant circumstances, constitutes a conflict of interest on Mr. Woodson's part, and may be violative of criminal statutes and procurement regulations. It argues that many inferences can be drawn from the relationship of Mr. Woodson and Suburban, and questions whether Mr. Woodson aided or advised Suburban in bid preparation or other matters, passed to Suburban information regarding Atlantic's work activity which was of a proprietary or confidential nature, or otherwise improperly assisted Suburban. It submits that Suburban's responsibility is directly connected to these questions on the basis that, if Suburban does maintain an improper relationship with a Government employee, its integrity, and thus responsibility, is affected. In connection with these points, Atlantic has submitted various affidavits allegedly substantiating its allegations, and it maintains that its affidavits have created certain presumptions on its behalf regarding statements made therein not rebutted by corresponding affidavits from the Army, Suburban, or Mr. Woodson. In particular, Atlantic submits several affidavits to the effect that Mr. Woodson, during a September 23, 1974, conversation with Atlantic personnel, acted as a representative of Suburban concerning Suburban's contracting activities and allegedly attempted to interest the Atlantic personnel in a compromise which would allow both companies to secure sufficient contract work without competition from the other. Atlantic vigorously argues that this alleged activity by Mr. Woodson for Suburban raises substantial inferences regarding Suburban's contracting operations and, therefore, its business integrity.

With regard to Suburban's manner of bidding, by letter of September 13, 1974 (filed September 17, 1974), Atlantic has submitted for our review the sworn affidavits of an Atlantic owner and Atlantic employee to the effect that, on June 12, 1974, Mr. Butler of Suburban advised the employee (who informed his employer on that date) that the Suburban bid was intentionally submitted in mistaken form so as to enable Suburban to withdraw its bid if it so desired. Atlantic maintains that these affidavits raise substantial questions regarding the responsiveness of Suburban's bid and its integrity as it relates to responsibility.

However, we view the argument in this regard as one relating to Suburban's business integrity and status as a responsible bidder and not as one involving the matter of bid responsiveness. The issue of whether Suburban's bid is

responsive because of the mistake has been previously considered in our discussions.

With regard to the questions raised concerning Suburban's status as a responsible prospective contractor, ASPR § 1-904 (1974 ed.) provides that no contract shall be awarded to a firm unless the contracting officer first makes an affirmative determination that the prospective contractor is responsible under the standards set forth in ASPR § 1-903 (1974 ed.) including a satisfactory record of integrity. On February 6, 1975, the contracting officer issued a written determination that Suburban is responsible within the meaning of the applicable regulations, including the following findings:

> "e. Allegations have been made by a protestor (The current janitorial contractor) concerning integrity and a conflict of interest. These allegations are based on the employment of Mr. Woodson (a Frankford Arsenal employee) by Suburban. The allegations have been thoroughly investigated and have been found to be totally without merit: (1) Mr. Woodson is a janitorial work inspector and does not have access to data which is not otherwise available to other bidders; (2) He is not an officer or administrative employee of Suburban (Supported by an affidavit from Suburban confirmed by DCASR); (3) He is a part-time janitorial employee of Suburban on non-federal work; (4) Mr. Woodson's activities were purely ministerial and did not involve discretionary act or access to procurement or contractual planning or decisions; (5) No actual conflict of interest exists, and Mr. Woodson's part-time janitorial employment with Suburban does not affect Suburban's integrity; (6) To avoid the appearance of a conflict of interest, Mr. Woodson will resign his position with Suburban Industrial Maintenance Company when, and if, an award is made to Suburban."

In this connection, it is the position of our Office that if pursuant to applicable regulation the contracting officer finds a bidder responsible there is no basis for our review of such determination in the absence of fraud on the part of the contracting officer. Matter of Central Metal Products, Incorporated, B-181724, July 26, 1974, 54 Comp. Gen. ____. The rationale for this rule is that questions of a bidder's capacity to perform turn on the general business judgment of the contracting officer and such judgment is largely subjective and, therefore, not readily susceptible to reasoned review. Matter of United Hatters, Cap and Millinery Workers International Union, B-177512, June 7, 1974, 53 Comp. Gen. ____.

Atlantic contends, however, that our review of such determinations should extend not only to the situation where fraud on the part of the contracting officer is alleged, but to the situation where, as here, there are allegations of fraud and/or conflict of interest involving the prospective contractor. This argument is apparently based upon the theory that the resolution of such issues involves a matter of law which is an objective determination susceptible of reasoned review, and in recognition of the fact that in recent cases we have reviewed affirmative responsibility determinations based upon objective responsibility criteria. See Matter of Yardney Electric Corporation, B-180988, December 24, 1974, 54 Comp. Gen. ___; Matter of Data Test Corporation, B-181199, December 20, 1974, 54 Comp. Gen. ___.

We do not believe that the rule enunciated in the Yardney and Data Test cases should be extended to the situation involved here because the rationale for the holding in those cases is not applicable. In Yardney and Data Test the solicitations included specific and definitive guidelines or requirements against which the bidder's compliance, and thus responsibility, could be objectively determined by the contracting officer and reviewed by our Office. While resolution of allegations of fraud and conflict of interest involve determinations which, as legal matters, may be based upon objective standards, the factual basis for such charges and the effect on integrity as that factor relates to responsibility involves the subjective judgment of the contracting officer whose determination should stand in the absence of his fraudulent conduct. In the instant case, since fraud on the part of the contracting officer has neither been alleged nor demonstrated, there is no basis for our Office to review the affirmative responsibility determination relative to Suburban.

Notwithstanding the foregoing rule as to our scope of review of affirmative determinations of responsibility, this Office would not be precluded from taking exception to an award where the legal effect of the contracting officer's findings showed a violation of law such as to taint the procurement. If, for example, the contracting officer's findings showed that conflict of interest statutes had been violated as alleged and that award to Suburban clearly would be contrary to the public interest, our Office would be compelled to object to such an award despite an affirmative determination of responsibility. Here, however, while Atlantic has alleged that the statutes and implementing regulations regarding conflict of interest have been violated, the contracting officer's findings do not support any such conclusion. The record shows that the Army conducted an investigation of the charges made by Atlantic concerning the conduct of Suburban and a Government employee and found that no actual or apparent conflict of interest existed. The contracting officer's findings

confirm, of course, that Mr. Woodson, a custodial inspector at the Frankford Arsenal, is also working part-time for Suburban in a custodial capacity. However, we do not view such dual employment, in the reported circumstances, as a per se conflict of interest tainting the procurement.

Accordingly, the protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States